

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 27842-5-III
)	
Respondent,)	
)	
v.)	Division Three
)	
ROBERT E. THOMAS,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, J. — This appeal from a conviction for manufacturing methamphetamine presents the question of whether the trial court should have granted a mistrial after a juror mouthed “thank you” to a witness.¹ We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial. The conviction is affirmed.

¹ In his *pro se* statement of additional grounds, Robert Thomas argues that his counsel should have sought to suppress the evidence and that a change of venue should have been sought. We find the arguments without merit and do not address them other than to note that the authority Mr. Thomas relied upon in the first claim was overruled in *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

FACTS

Robert Thomas lived in a recreational vehicle (RV) parked on his father's property. His father suspected that he was manufacturing methamphetamine. The father entered the RV and observed several suspicious signs: a stainless steel pot emitting a strong chemical odor, xylene, sulfuric acid, battery acid, red phosphorus, and Red Devil lye. The father conveyed the information to a Columbia County Sheriff's deputy who reached the same conclusion. A search warrant was obtained and served on the property.

The search team discovered evidence suggesting that manufacturing had taken place on the property. Mr. Thomas was charged in the Columbia County Superior Court with one count of manufacturing methamphetamine. The case proceeded to jury trial.

The first day of trial concluded with a detective testifying about how methamphetamine was manufactured. He explained two methods of manufacturing the product: (1) the red phosphorus method which uses iodine crystals, (2) the anhydrous ammonia method which involves three phases.

The day's activities concluded with that general testimony about manufacturing techniques; the detective was scheduled to return the following day to discuss Mr. Thomas's particular case. On the way out of the courtroom, one of the jurors—a retired science teacher—mouthed “thank you” to the detective.

The judge noted the incident for the record. The next morning, defense counsel moved for a mistrial and, alternatively, to remove the juror for misconduct. The court denied both motions, ruling that since the detective had been testifying only about general topics rather than Mr. Thomas's case, there was no prejudice to Mr. Thomas. The court also noted that it had not prohibited the jurors from speaking to witnesses or the parties. The court then instructed the jurors that they should not communicate in any manner with the parties or witnesses.

The jury found Mr. Thomas guilty as charged. He received a standard range sentence and then timely appealed to this court.

ANALYSIS

Mr. Thomas argues that the court erred in not granting the mistrial or, at the least, in not removing the juror. The trial court articulated tenable bases for its rulings.

The decision to grant or deny a mistrial for juror misconduct is reviewed for abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A new trial should be granted when the defendant has been so prejudiced that only a new trial will ensure a fair trial. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Similarly, the decision whether to remove a juror is also reviewed for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). Discretion is abused when it is

exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

This court has noted:

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. However, the presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant.

State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30 (citations omitted), *review denied*, 107 Wn.2d 1002 (1986).

Appellant argues that the State did not overcome the presumption of prejudice by showing the juror's misconduct to be harmless beyond a reasonable doubt. The trial court found the juror's actions did not prejudice the defendant. We agree.

The comment came at the end of generic testimony about how methamphetamine is clandestinely created. The testimony did not relate specifically to Mr. Thomas. There was simply no reason to believe that the comment showed bias to one side of the case. Trial judges frequently thank witnesses at the end of their testimony without concern that such courtesy establishes judicial bias.

Far more egregious juror-witness communications have been found to be non-prejudicial. In *State v. Lemieux*, 75 Wn.2d 89, 448 P.2d 943 (1968), a witness was left on the witness stand in the presence of the jury while the judge and counsel conferred in

chambers. The witness told jurors about his own experience as a juror and bragged to them that if he had not brought a wineglass to the police, the fingerprint evidence against the defendant would not have been discovered. *Id.* at 90. The trial court declined to grant a new trial, finding no prejudice to the defendant. The Washington Supreme Court agreed, finding there were no reasonable grounds to believe that the defendant had been deprived of a fair trial. *Id.* at 91. In *Murphy*, a juror had spoken with her daughter about the case and learned that the daughter believed the defendant to be guilty. 44 Wn. App. at 295-296. This court affirmed the trial court's decision to deny a new trial, concluding that the defendant had not been prejudiced in light of the juror's initial vote for acquittal. *Id.* at 296.

Here, a former science teacher mouthed appreciation to a witness who had explained two chemical processes for making methamphetamine. We agree that this courteous expression did not prejudice Mr. Thomas. The trial court did not abuse its discretion when it denied the mistrial.

A trial judge has the duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias . . . or . . . conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. The trial court found that the juror did not violate any order of the court

because while the jury had been instructed that the parties could not talk to them, there had been no corresponding restriction on the jurors speaking to the participants. The trial court then corrected that oversight by telling the jury that it would be improper for them to talk to any witnesses or lawyers.

This, too, was a tenable ground for denying the motion to remove the juror. The juror had not failed to follow the court's instructions. The "thank you" did not constitute an expression of bias. The statutory grounds for removal were not established.

The trial court did not abuse its discretion when it denied both motions. The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

No. 27842-5-III
State v. Thomas

Sweeney, J.